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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/585,377	07/05/2006	Annelie Dochling	3636	5949
278	7590	11/25/2009		
MICHAEL J. STRIKER 103 EAST NECK ROAD HUNTINGTON, NY 11743				
EXAMINER				
ELHELO, EISA B				
ART UNIT		PAPER NUMBER		
1796				
NOTIFICATION DATE		DELIVERY MODE		
11/25/2009		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

striker@strikerlaw.com

Office Action Summary

Application No.

10/585,377

Applicant(s)

DOEHLING ET AL.

Examiner

Eisa B. Elhilo

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 August 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/CD)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

- 1 This action is responsive to the amendment filed on August 27, 2009.
- 2 The cancellation of claim 14 is acknowledged. Pending claims are 1-13.
- 3 The rejection of claim 14 under 35 U.S.C. 112 2nd paragraph and 101 is rendered moot because of the cancellation of claim 14 by applicant's amendment.
- 4 The rejection of claims 1-13 under 35 U.S.C.103(a) as being unpatentable over Laurent et al. (US' 431 A1) in view of Jacquet et al. (US' 919), is maintained for the reasons set forth in the previous office action mailed on May 27, 2009.

Response to Applicant's Arguments

- 5 Applicant's arguments filed 8/27/2009 have been fully considered but they are not persuasive.

With respect to the rejection of the claims under 35 U.S.C. 103(a) as being unpatentable over Laurent et al. (US' 431 A1) in view of Jacquet et al. (US' 919), Applicants argue that the optimization asserted as obvious in the rejection could not have led the presently claimed invention because the optimization of the ingredients recited in the present claims was targeted toward achieving stable nacreous luster in dyed keratin fibers. Applicants also argue that the references do not support any reason for modifying Laurent's slow oxidation dye composition to include cetyl alcohol and mono- or di-ethanolamide from among a long list of ancillary ingredients to produce a product similar to that presently claimed. The applicants also argue that Neither Laurent nor Jacquet teach or suggest compositions that provide a stable nacreous luster when used to dye hair.

The examiner respectfully disagrees with the above arguments because the optimization of results, a patent will not be granted based upon the optimization of result effective variable when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the prima facie case of obviousness, see *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). See also *In re Woodruff*, 919 F. 2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). In this case applicants have not shown on record the criticality of the claimed ratio in the claimed composition.

With respect to applicant's argument that Jacquet emphasizes the particular utility of the quaternized polymer as a pretreatment but emphasizes no other utility involving hair, the examiner would like to point out that the use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain. "*In re Heck*, 699 F.2d 1331, 1332-33 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Iemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)). Further, a reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including non-preferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 10 USPQ2d 1843 (Fed.Cir.), cert. denied, 493 U.S. 975 (1989). Furthermore, the open language of the claims "comprising" allowed a person of ordinary skill in the art to add more dyeing ingredients in the dyeing composition.

With respect to the applicant's argument that cetyl alcohol and mono-or di-ethanolamide are chosen from among a long list of ancillary ingredients to produce a product similar to that

presently claimed, the examiner would like to point out that obviousness may be established by a general teaching in a prior art reference. See *In re Corkill*, 771 F.2d 1496, 1500, 226 USPQ 1005, 1008 (Fed. Cir. 1985) (Obviousness rejection of the claims affirmed in light of prior art teaching that “hydrated zeolites will work” in detergent formulation, even though “inventors selected the zeolites of claims from among ‘ thousands’ of compounds”). See also *Merck v. Biocraft*, 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir. 1989); *In re Susie*, 440 F.2d 442, 445, 169 USPQ 423, 425 (CCPA 1971).

In this case Laurent et al. (US’ 431 A1) as a primary reference teaches a hair dyeing composition comprising oxidation dyes (see page 13, paragraph, 0312), 0.2 to 40% of fatty alcohol alkoxyates such as stearyl alcohol having 20 EO as claimed (see page 9, paragraphs, 0221-0244 and page 10, paragraph, 0251), alkanolamine derivatives and coconut acid monisopropanolamide in the amount of 4% as claimed (see page 21, paragraph, 0472 and page 22, paragraph, 0493). Jacquet et al. (US’ 919) as a secondary reference in analogous art of hair dyeing formulation, teaches a composition comprising cetyl alcohol and mono or di-ethanolamides derived from lauric acid as claimed (see col. 7, line 6 and lines 40-46). Therefore, there is a sufficient motivation to one having ordinary skill in the art to be motivated to modify the dyeing composition of Laurent et al. by incorporating the claimed species of cetyl fatty alcohol and fatty amides as taught by Jacquet et al. and to optimize the amounts of the dyeing ingredients in the dyeing composition in order to get the maximum effective results and also for improving the dyeing performance of the composition. Therefore, the prima facie of obviousness has been established.

6 **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eisa B. Elhilo whose telephone number is (571) 272-1315. The examiner can normally be reached on M - F (8:00 -4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Pyon Harold can be reached on (571) 272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would

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like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Eisa B Elhilo/

Primary Examiner, Art Unit 1796

November 19, 2009